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We are of opinion, therefore, that the demurrer to evidence should have been sustained, and the judgment of the circuit court must be reversed.

Note.

There is a marked similarity between the facts in this case and in Stegall's case, 54 S. E. 19. In the Stegall case the plaintiff was walking on a trestle of defendant company, which the public was, with the defendant's consent, accustomed to use as a pathway. Defendant backed a train over the trestle, keeping no lookout, at a rate of speed forbidden by a city ordinance and killed plaintiff. President Keith did not take part in the decision of this case. The first count in the principal case in effect charged that the place on defendant's track, where plaintiff's intestate was killed, was daily used by a large number of people, which fact was known to the defendant company, and thereby it became and was the duty of the defendant company to keep a lookout for persons on its track, so as to discover and not to injure them; that it neglected this duty, and by reason of this neglect, plaintiff's intestate was killed. This was exactly the state of facts in Stegall's case, but as the court below based its decision solely on the second count, charging that defendant company took no measures to prevent the accident after discovering the plaintiff's peril, it was unnecessary to pass upon this most interesting question as to whether there is any higher duty owed to licensees on the track than to trespassers. In short, are we to retain the harsh doctrine announced in Stegall's case that a railroad company does not owe even to licensees the duty of trying to discover them upon the tracks, thus placing licensees and trespassers upon the same footing; and this in the face of Plankenship *v.* Railroad Co., 94 Va. 449; Railroad Co. *v.* White, 84 Va. 498, stating the law to be that reasonable care is the duty which a railroad company owes, at the least, in all cases, to all persons; that what is reasonable care depends on the circumstances; that not keeping a lookout for possible trespassers upon its tracks is not such an onlission of reasonable care as will make a railroad company liable; but that the duty of using reasonable care to discover them is due to lieensees, who from the fact that their presence is acquiesced in by the railroad company, occupy toward such company a higher position than do mere trespassers, and are entitled to a greater protection by the law.

See learned note by Mr. Robert W. Withers, in 12 Va. Law Reg. 419.

COFFMAN *v.* LIGGET'S ADM'R *et al.*

Nov. 21, 1907.

[59 S. E. 392.]

1. Assignments—Rights of Subsequent Assignees.—A subsequent assignee of a thing in action for value and without notice of a prior assignment takes in equity a right superior to a prior assignment without transfer of the legal title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignment, §§ 149, 150.]

2. Same—Essentials.—An assignor of a chose in action must part

with the power of control over the chose assigned, and the assignment must be so delivered as to be irrevocable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignment, § 61.]

3. Insurance—Assignments—Priorities.—An assignment of so much of the assignor's life policy as would be sufficient to pay his indebtedness to the assignee was not delivered, and the assignee had no knowledge thereof until after the death of the assignor, when it was found among his papers. The assignee did not know that the assignor was indebted to him because of misappropriation of funds intrusted for investment. Held, that a subsequent assignee of the policy for value and without notice, in the manner prescribed by the policy, took in equity a right superior to the assignment.

[Ed. Note.—For cases in pont, see Cent. Dig. vol. 28, Insurance, § 493; vol. 4, Assignments, §§ 61-84.]

Appeal from Circuit Court, Rockingham County.

Suit by W. S. Lurty and another against one Liggett's administrator and another. From the decree, defendant Maggie G. Coffman appeals. Affirmed.

Harnsberger & Harnsberger, for appellant.
Sipe & Harris, for appellees.

HARRISON, J. The life of Winfield Liggett was insured, for his own benefit, by policy No. 2,996 in the Life Insurance Company of Virginia for the sum of $3,000, which has been paid, and is now under the control of the circuit court of Rockingham county in this suit. The matter in controversy is the right of priority in the distribution of this fund between certain creditors of Winfield Liggett, the insured, each of whom claims under an assignment of the policy from which the fund was derived, made by the insured in his lifetime.

The record shows that on the 29th day of November, 1901, while the policy was still in his possession and under his control, the insured assigned and transferred the same to W. S. Lurty as collateral security for the payment of a bond for $1,000 executed by Liggett to Lurty. It further appears that on the 12th day of September, 1904, the entire policy was, for value received, assigned and transferred by the insured to W. S. Lurty, subject only to a debt of $274 and its interest, borrowed money due from the insured to the company. The completeness of Lurty's purchase of the policy, under the assignment and transfer last mentioned, cannot be questioned. Due notice of this assignment, acknowledged before a notary public, was given in writing to the company, and recognized and accepted by it in writing. Prior

to this assignment to Lurty of September 12, 1904, the policy had been, in January, 1904, assigned by the insured to N. W. Berry to secure him as indorser of a negotiable note for $670.

After the death of Winfield Liggett, which occurred on the 16th day of February, 1905, there was found with his papers in his office safe the following paper, dated February 26, 1895, signed by him under his hand and seal:

I hereby transfer and assign to Maggie G. Coffman so much of my life insurance policy, in the Life Insurance Company of Virginia, as will be sufficient to pay to her whatever amount I may owe her at the date of my death."

It appears that several years before the date of this paper Maggie G. Coffman had placed in the hands of Winfield Liggett, who was a practicing attorney of the Harrisonburg bar, certain funds to be invested by him as her attorney. These funds were invested at first, but were afterwards collected by Liggett and appropriated to his own use; he thereby becoming the debtor of Maggie G. Coffman, which relation he continued to occupy until his death.

The sole question to be determined is whether, under the circumstances disclosed by the record, Maggie G. Coffman, the appellant, is entitled to priority in the distribution of the fund arising from this policy; it being insisted that she has the first right, because the assignment in her favor was prior in time to that under which the appellee Lurty claims.

It is contended on behalf of the appellee that there was no complete assignment of this policy to the appellant, that the alleged assignor retained the power of revocation by retaining the paper relied on in his possession and never delivering the same, and that, having this power of revocation, he had the power to make a subsequent valid assignment of the policy. On the other hand, it is contended on behalf of the appellant that the assignor, Liggett, was her trusted attorney and agent to invest her funds; that when he wrote the assignment of the policy for her benefit, and placed the same with her papers in his safe, it was a constructive delivery; and that he thereafter held the paper as her agent, without power to impair her rights in the policy by a subsequent assignment thereof.

So far as the record shows, the existence of the paper under which the appellant claims was never known to any one but its author until after his death, when it was found by his administrator, together with a statement of his indebtedness to the appellant and a letter relating to her investments, in a filing envelope in the defendent's office safe. It is not clear from the record

that appellant knew that Liggett had reduced her investments to money and was himself her debtor. She does not appear to have ever demanded any security of Liggett as her debtor, nor does he appear to have ever promised to furnish any security, nor was any mention or intimation with respect to the policy in question ever made to her by him, although he appears to have written her letters with respect to her investments. The paper relied on as an assignment was kept within its author's own knowledge, and within his own exclusive power and control. There was never a moment that appellant had any power or control over the paper.

It is true, as insisted, that delivery is a matter of intention, and that the form of the assignment is not material. Skipwith's Ex'r *v.* Cunningham, 8 Leigh 271, 31 Am. Dec. 642; Tatum *v.* Ballard, 94 Va. 370, 26 S. E. 871. But the evidence does not show that Liggett ever intended to deliver the alleged assignment to that appellant. He does send her word not to be uneasy about her investments—that her money was safe, but all of his communications studiously avoid any mention of the policy, or any intention to deliver the alleged assignment. The absence of intention to deliver the paper in question is further shown by the fact that Liggett retained possession of the policy, used it as collateral security, borrowed money upon it, and finally transferred and assigned it to the appellee for full value received. Whatever may have been Liggett's purpose when he first wrote the paper now in controversy, that purpose was never consummated because of his power to recall it; and, when the absolute assignment was made to Lurty, the purpose theretofore existing, if any, to assign to appellant, was abandoned.

The rules of the insurance company require that an assignment of its policies shall be made in duplicate and sent to the company for acknowledgment, when one is returned to the assignee of the policy and the other retained by the company. This was never done with respect to the alleged assignment under which appellant claims. The appellee acquired, for value received, the complete legal and equitable title to the policy, giving the company due notice of the assignment to him, without any notice or knowledge of the paper under which appellant claims, and without any means of ascertaining that such a paper was in existence.

In Pomeroy's Equity it is said that a subsequent assignee takes superior to a prior equity, when the second assignee, in good faith and without notice of a prior outstanding equity, protects or supports his own interest by obtaining a legal title or legal position, and that in such a case the general doctrine that an assignment is

subject to outstanding equities of third persons does not apply. 2 Pom. Eq. § 698, and note.

The Supreme Court, considering the same subject, points out that the general rule, "First in time, best in right," has exceptions, and that a subsequent assignee of a pure thing in action will be protected by a court of equity in any advantage which he has gained by his own diligence, or by the neglect of a prior assignee. In a well-considered case the court says: "Corcoran's assignment was fair, and accepted on his part without knowledge of Judson's; nor is the contrary alleged in the bill. And assuming Judson's to be fair also, and that no negligence can be imputed to him, then the case is one where an equity was successively assigned in a close in action to two innocent persons, whose equities are equal, according to the moral rule governing a court of chancery. Here Corcoran has drawn to his equity a legal title to the fund, which legal title Judson seeks to set aside, and asks an affirmative decree in his favor to that effect. Now, nothing is better settled than that this cannot be done. The equities being equal, the law must prevail." In this case it is further said: "The assignment was held up, and operated as a latent and lurking transaction, calculated to circumvent subsequent assignees, and such would be its effect on Corcoran, were priority accorded to it by our decree." Judson *v.* Corcoran, 17 How. 612, 15 L. Ed. 331. See, also, Bayley *v.* Greenleaf, 7 Wheat. 46, 5 L. Ed. 393; Graham Paper Co. *v.* Pembroke, 124 Cal. 117, 56 Pac. 627, 44 L. R. A. 632, 71 Am. St. Rep. 26; Palmer *v.* Merrill, 6 Cush. 282, 52 Am. Dec. 782.

The decisions of this court are, we think, to the effect that the assignor of a chose in action must part with the power of control over the thing assigned, and that the evidence of assignment must be so delivered as to be irrevocable by the assignor. Tatum *v.* Ballard, *supra.*

The case of Spooner *v.* Hilbish, 92 Va. 333, 23 S. E. 751, involved the validity of the gift of an insurance policy by the insured to a third party. The doctrine was there announced with respect to a gift, which was without consideration, that there must be a delivery of possession of the thing given, or the means of obtaining it, so as to make the disposition of it irrevocable.

There is nothing more common in the business life of the present day than the assignment of insurance policies as collateral security for borrowed money. If a secret equity, such as that sought to be enforced by the appellant, could prevail against a bona fide purchaser of a policy, such as Lurty is shown to have been, the result would be disastrous to the use of these policies as a means of borrowing money.

We are of opinion that, under the facts and circumstances of this case, there was neither an actual nor a constructive delivery

of the assignment in question to the appellant, or to any one for her benefit. The circuit court, therefore, did not err in holding that the transfer of the policy to W. S. Lurty was to be preferred in equity and right to the alleged assignment thereof to appellant, and its decree must be affirmed.

Note.

As was said by the court in this case "there is nothing more common in the business life of the present day than the assignment of insurance policies as collateral security for borrowed money," and hence the importance of this decision, not because it announces any new doctrines, but because it deals so clearly with one of the daily transactions of life that it can be easily grasped by the lay mind. In taking the assignment of an insurance policy, this case decides, it is always safer to take an actual and physical, as distinguished from a constructive delivery of the policy, so as to put it out of the power of the assignor to revoke it; and due notice of this assignment, acknowledged before a notary public, should be given in writing to the company, and recognized and accepted by it in writing. The only evidence that the unsuccessful appellant had of her right and title to the proceeds of the policy was a written assignment thereof in the handwriting of the insured, found amongst his papers after his death. The court said: "The paper relied on as an assignment was kept within its author's own knowledge and within his own exclusive power and control. There was never a moment that appellant had any power or control over the papers."

See note to Johnson *v.* Alexander, 9 L. R. A. 660.

CHESAPEAKE & O. RY. CO. *v* ADM'R.

Nov. 21, 1907.

[59 S. E. 398.]

1. Carriers—Injury to Person Assisting Passenger.—A person accompanying passengers to assist them in entering a train, though not a passenger, is not a trespasser, nor bare licensee, as he has at least a tacit invitation from the carrier by virtue of the relation between it and the passenger, and the carrier must exercise at least ordinary care to avoid injuring him by defective stational facilities or approaches thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1242.]

2. Same—Persons Assisting Passenger—Duty to Hold Train Until They Have Disembarked—Notice of Intent.—Though a person assisting a passenger in boarding a train has a right to enter the train in conformity with a practice acquiesced in by the carrier, he should inform those in charge of his purpose; and, where they have no actual